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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO RODRIGUEZ,

Defendant and Appellant.

B280915

(Los Angeles County  
Super. Ct. No. BA445443)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed in part and reversed in part.

Lori A. Nakaoka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

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Gerado Rodriguez appeals from his judgment of conviction of two counts of carjacking (Pen. Code, § 215, subd. (a)), with true findings on gang enhancements (§ 186.22, subd. (b)). Rodriguez raises the following arguments on appeal: (1) the evidence was insufficient to support the carjacking convictions and the gang enhancement findings; (2) admission of the gang expert's testimony violated California hearsay law and the Sixth Amendment right of confrontation; (3) the denial of Rodriguez's motion for a mistrial was error based on the introduction of inadmissible propensity evidence; and (4) the prosecutor committed prejudicial misconduct in closing argument by misstating the burden of proof. We reverse the true findings on the gang enhancement allegations, but otherwise affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. The Charges**

In an information, the Los Angeles County District Attorney charged Rodriguez and his co-defendant, Byron Rosas, with the carjacking of Anthony G. and Mishel V. (Pen. Code,<sup>1</sup> § 215, subd. (a)). As to each count, it was alleged that Rodriguez and Rosas committed the offense for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)), and that a principal personally used a firearm in the commission of the offense (§ 12022.53, subds. (b), (e)(1)). It also was alleged that Rodriguez had two prior serious or violent felony convictions

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Penal Code.

within the meaning of section 667, subdivision (a)(1) and the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12), and had served four prior prison terms within the meaning of section 667.5, subdivision (b).

## **II. The Evidence At Trial**

### **A. The Taking of Anthony G.’s Vehicle**

On the evening of March 26, 2016, Anthony G., and his friend, Mishel V., went to a liquor store on Laveta Terrace and Temple Street in Los Angeles.<sup>2</sup> Prior to entering the store, Anthony saw Rodriguez in a black car staring at him. Mishel also told Anthony, “He keeps staring at us.” Anthony and Mishel entered the store and selected some items to purchase.

Rodriguez also entered the store and continued to stare at Anthony. As Anthony and Mishel waited in line to pay for the items, Rodriguez and a female companion stood directly behind them, but did not say anything to them. Anthony placed his car keys on the counter as he paid for the items. He and Mishel then exited the store, inadvertently leaving the keys on the counter.

Once outside the store, Anthony realized he no longer had his car keys. He and Mishel went back to the store to look for the keys, but could not find them. At that time, Rodriguez was no longer inside the store and had driven off in his black car. Mishel

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<sup>2</sup> Anthony testified at trial, but initially stated that he had nothing to say because his car had been recovered. He admitted that he had received threats over the telephone and on Facebook about his involvement in the case. He also admitted that, during a prior hearing, a person who looked like one of the defendant’s brothers repeatedly stared at him and made him feel afraid. Mishel did not testify at trial, and the police had been unable to contact her since the preliminary hearing in the case.

told Anthony that she thought the man standing in line behind them might have taken the keys. Mishel also suggested that they try to view the store's surveillance video. The video showed that the keys were on the counter when Anthony and Mishel left the store, and were gone immediately after Rodriguez approached the counter and then walked away.

After viewing the surveillance video, Anthony and Mishel left the store a second time. As they approached Anthony's 2005 Mini Cooper, Anthony saw Rosas using the keys to unlock the door to Anthony's car. At that point, Anthony was standing less than a foot away from the car, and Mishel was standing behind Anthony about six to eight inches away. Mishel told Rosas, "That's my car. That's our car. That's our car. Give it back." Rosas did not say anything in response. However, as he was getting into the car, Rosas lifted the front of his shirt, which caused Anthony to fear that Rosas might have a gun. Anthony then told Mishel, "Don't do anything. Anything could happen to us. We could get beat up. We don't know. We could get shot. We don't know."

Another man who was not Rodriguez was also standing near the car when Anthony and Mishel approached. That man walked toward Anthony and Mishel, and told Mishel to back away. Once inside the car, Rosas used the keys to turn on the ignition. Rosas then put the car in reverse, and struck another car as he drove away from the scene. Anthony did not see Rodriguez again after he left the store, but he did notice Rodriguez's car "driving around" the vicinity.

Anthony called 911 shortly after his car was taken. He told the 911 operator that "some gangsters just took my car," and that he "did not get near them because it was . . . multiple guys."

Anthony provided a physical description of two of the men, and stated that the one who drove off with the car had a tattoo on his face near his eye. At trial, Anthony described the tattoo he saw on Rosas's face as "weird" and "wavy." Anthony also testified that he saw a tattoo on Rosas's stomach when he lifted his shirt.

Rodriguez was arrested four days after the theft of Anthony's car. Anthony's cell phone had been inside his car when the car was taken, and was recovered from Rodriguez's car at the time of his arrest.

### **B. Gang Expert Testimony**

Los Angeles Police Officer Mark Flores testified as a gang expert for the prosecution. He had been a gang officer in the Rampart Division since 2012, and was familiar with the Diamond Street gang. The gang had been in existence since the 1920s and currently had 60 to 70 members. The Diamond Street gang used the letters "DST" and the shape of a diamond in the form of tattoos, apparel, and hand gestures as a common sign or symbol. The territory claimed by the gang included the area of Laveta Terrace and Temple Street where Anthony's car was taken. The primary activities of the Diamond Street gang were assaults with a deadly weapon, robberies, batteries, extortion, murders, and attempted murders. A member of the Diamond Street gang named Moises Garcia committed the crime of carrying a loaded firearm in public on June 28, 2013, and another Diamond Street gang member named Hector Sanchez committed the crime of robbery on November 30, 2013.

Officer Flores was familiar with both Rosas and Rodriguez and saw them together on one occasion in October 2015. He opined that both defendants were members of the Diamond Street gang. With respect to Rosas's gang membership, Officer

Flores had prior consensual encounters with Rosas in which he admitted to being a Diamond Street gang member with the monikers Snoops and Trips. On one occasion, Rosas told Officer Flores that he had been in the gang for about 10 years. Officer Flores also recognized Rosas in photographs that showed him making Diamond Street gang hand gestures. Rosas had a tattoo of the letters “DST”, which stood for Diamond Street, above his right eyebrow, and a tattoo of the letters “FLS,” which stood for the Furman Locos clique of the gang, above his left eyebrow. With respect to Rodriguez’s gang membership, Officer Flores testified that he had 10 to 15 prior encounters with Rodriguez, and that Rodriguez had admitted to being a member of the Diamond Street gang with the moniker “Jokey.” About a year and a half before the November 2016 trial, Rodriguez told Officer Flores that he had been in the gang for 29 years and was a “shot caller,” or high-ranking gang member. Following Rodriguez’s arrest in this case, Officer Flores took photographs of his gang-related tattoos, which included tattoos of diamond shapes and the word “Diamond” on his chest, stomach, arms, and back.

When presented with a hypothetical based on the facts in this case, Officer Flores opined that the carjacking would have been committed for the benefit of, at the direction of, or in association with a criminal street gang. Officer Flores testified that the carjacking would benefit the gang because it would instill fear and intimidation within the community, and bolster the reputation of the gang and its members. The presence of visible gang tattoos on the face of the gang member taking the car would convey a non-verbal message to the victim that he could be killed if he tried to stop the crime. It would also dissuade the victim from reporting the crime or testifying at trial

for fear of retaliation by the gang. Officer Flores further stated that the carjacking would have been done in association with, and at the direction of, the gang because multiple gang members acted in concert to commit the crime with a senior gang member taking the keys and a younger gang member taking the car. The senior gang member would not have to be present when the car was taken because he would have already achieved his status in the gang. Instead, he could hand off the keys to the younger gang member to complete the crime for the gang's benefit.

### **III. Verdict and Sentencing**

The jury found both Rodriguez and Rosas guilty of two counts of carjacking. The jury also found the gang enhancement allegations to be true, but found the firearm enhancement allegations to be not true. In a bifurcated proceeding, the trial court found that Rodriguez had two prior serious or violent felony convictions within the meaning of the Three Strikes Law, and had served three prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Rosas to a total term of 13 years in state prison, and Rodriguez to a total term of 31 years in state prison. Rodriguez timely appealed.<sup>3</sup>

## **DISCUSSION**

### **I. Sufficiency of Evidence on the Carjacking Counts**

Rodriguez first challenges the sufficiency of the evidence supporting his conviction for two counts of carjacking. He contends there was no substantial evidence to support a finding

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<sup>3</sup> Rosas also timely appealed, but later filed a request to dismiss his appeal. This court granted Rosas's request, and issued a remittitur in his case on February 5, 2018.

that he acted with the requisite criminal intent to be liable for carjacking. He also claims the evidence failed to establish that the offense of carjacking was committed against Mishel.

### **A. Relevant Law**

In considering a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict. [Citation.]’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; see *People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

“Section 215, subdivision (a), defines carjacking as “the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person

or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.” [Citation.]” (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) A conviction for carjacking accordingly “requires proof that (1) the defendant took a vehicle that was not his or hers (2) from the immediate presence of a person who possessed the vehicle or was a passenger in the vehicle (3) against that person’s will (4) by using force or fear and (5) with the intent of temporarily or permanently depriving the person of possession of the vehicle. [Citations.]” (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 533; see also *People v. Hill* (2000) 23 Cal.4th 853, 858-859.)

“[A]n aider and abettor’s liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also ‘for any other offense that was a “natural and probable consequence” of the crime aided and abetted.’ [Citation.]” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) To convict a defendant under the natural and probable consequences doctrine, the jury “must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant’s confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that

the defendant aided and abetted.” (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. omitted.) “Liability under the natural and probable consequences doctrine ‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonable foreseeable consequence of the act aided and abetted.’ [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 920.) “A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury. [Citations.]” (*Ibid.*)

**B. Substantial Evidence Supported Rodriguez’s Convictions Under the Natural and Probable Consequences Doctrine**

Rodriguez argues his conviction for two counts of carjacking must be reversed because the evidence was insufficient to support a finding of guilt under an aiding and abetting theory of liability. He specifically asserts the prosecution failed to prove that he aided and abetted the carjacking committed by Rosas, or that the carjacking was a natural and probable consequence of any target crime that he aided and abetted. Viewing the evidence in the light most favorable to the jury’s verdict, we conclude the evidence was sufficient to establish that Rodriguez aided and abetted the theft of Anthony’s vehicle, and that carjacking was a natural and probable consequence of the theft.

First, there was substantial evidence to support a finding that Rodriguez directly aided and abetted the theft of Anthony’s vehicle. The prosecution presented evidence that Rodriguez saw Anthony and Mishel outside the liquor store and stared at them in a menacing manner. Rodriguez continued staring at the young couple once they entered the store, and stood directly behind

them while they waited in line to make a purchase. As Anthony testified, he “felt like [Rodriguez] was dogging [him].” The prosecution also presented evidence that, after Anthony inadvertently left his car keys on the counter, Rodriguez took the keys and then walked out of the store. Minutes later, Rodriguez’s fellow gang member, Rosas, used those keys to take Anthony’s Mini Cooper. When Rodriguez was arrested a few days later, he was in possession of Anthony’s cell phone, which had been inside the Mini Cooper at the time it was taken. From this evidence, the jury reasonably could have inferred that Rodriguez took Anthony’s keys and gave them to Rosas with the intent that Rosas would use the keys to take Anthony’s vehicle.

Second, the evidence was sufficient to support a finding that the carjacking committed by Rosas was a natural and probable consequence of the vehicle theft that Rodriguez aided and abetted. The evidence showed that Anthony and Mishel left the store shortly before Rodriguez took Anthony’s car keys from the counter, and that they returned less than a minute after Rodriguez walked out of the store with the keys. The evidence also showed that Anthony and Mishel were still on the premises and searching for the keys when Rosas gained possession of them from Rodriguez. Indeed, once Anthony’s car keys were taken, he and Mishel could not readily leave the location because they no longer had access to a vehicle. The evidence also showed that Rosas began using the keys to unlock the Mini Cooper as Anthony and Mishel were walking back to the car after viewing the store’s surveillance video. Under these circumstances, it was reasonably foreseeable that Anthony and Mishel would see the theft of the vehicle in progress and would try to intervene, leading to a physical confrontation between Rosas and the couple

and a swift escalation of the theft into a carjacking. (See *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131-1132 [vehicle theft can escalate into a carjacking where the defendant resorts to the use of force or fear to retain possession of the vehicle].)

Rodriguez claims the evidence showing that he may have taken Anthony's car keys was insufficient to support a finding that he intended for Rosas to take Anthony's car. Rodriguez reasons that, while his act of taking the keys might support an inference "of some kind of criminal purpose on [his] part," there were possibilities other than a vehicle theft, such as taking the keys "for a future auto burglary" or to "give, trade, or sell to someone else for that person's own criminal purpose." Contrary to Rodriguez's contention, however, the evidence connecting him to Rosas's theft of Anthony's car was not limited to his act of taking Anthony's keys. There was also evidence that Rodriguez and Rosas were in the same gang, that they had been seen together in the past, that Rodriguez was a shot caller in the gang while Rosas was a more junior member, and that Rodriguez had possession of Anthony's cell phone a few days after Rosas took the car. From this evidence, the jury reasonably could have concluded that Rodriguez acted with the specific intent to aid and abet Rosas in the theft of Anthony's vehicle. Moreover, in reviewing a challenge to the sufficiency of the evidence, "if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] Accordingly, we need not—and do not—address all of defendant[s] . . . alternative theories regarding the inferences that should have been drawn from the evidence." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162; see also *People v.*

*Farnam* (2002) 28 Cal.4th 107, 144 [where “the circumstances reasonably justify the jury’s findings, we may not reverse the judgment simply because the circumstances might also reasonably be reconciled with defendant’s alternative theories”].)

Rodriguez also contends the evidence was insufficient to show that he intended for Rosas to take the vehicle from the immediate presence of Anthony and Mishel, or to accomplish the taking through the use of force or fear. In support of this claim, Rodriguez points out that he and Rosas were never seen together planning a carjacking, and that Rosas’s confrontation with the victims occurred after Rodriguez had driven away from the area. However, to find Rodriguez guilty under the natural and probable consequences doctrine, the jury did not have to find that he intended to aid and abet the crime of carjacking. Rather, the jury had to find that Rodriguez intended to aid and abet the crime of vehicle theft, and that carjacking was a natural and probable consequence of the theft. Therefore, while there was no evidence that Rodriguez actually knew that Rosas would resort to force or fear to take the car from the victims’ immediate presence, such prior knowledge is not required under the natural and probable consequences doctrine. As our Supreme Court has observed in the context of a gang-related shooting, “it [is] not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed.” (*People v. Medina, supra*, 46 Cal.4th at p. 924.) Instead, “[t]he issue is “whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have or should have known that the [charged crime] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.” (*Id.* at p. 927.) Here, there was

substantial evidence to support a finding that Rodriguez aided and abetted a fellow gang member in committing a vehicle theft that foreseeably resulted in a carjacking, and thus, acted with the requisite criminal intent for a carjacking conviction.

**C. Substantial Evidence Supported Rodriguez's Conviction for the Carjacking of Mishel**

Rodriguez also asserts his conviction for the carjacking of Mishel must be reversed because the evidence was insufficient to support a finding that the crime was committed against Mishel. In particular, Rodriguez claims the evidence failed to establish that Mishel was either a possessor or a passenger in Anthony's car because the prosecution failed to elicit testimony that Anthony and Mishel drove to the liquor store together or planned to drive away together. Rodriguez also contends the prosecution failed to prove that Rosas used any force or fear against Mishel because there was no evidence that Mishel was aware of Rosas's sole aggressive act of lifting his shirt as he was taking the car. Based on the totality of the evidence, however, we conclude there was substantial evidence to support a finding that Mishel was a passenger in Anthony's car, and that Rosas used force or fear against both Anthony and Mishel to accomplish the taking.

**1. Mishel's Status as a Passenger in the Car**

"Carjacking is a crime against the possessor or passengers in a vehicle." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) As the Supreme Court has explained: "In the usual case of carjacking involving multiple occupants, all are subjected to a threat of violence, all are exposed to the high level of risk which concerned the Legislature, and all are compelled to surrender their places in the vehicle and suffer a loss of transportation. All

are properly deemed victims of the carjacking.’ [Citation.]” (*People v. Hill*, *supra*, 23 Cal.4th at p. 859.) Additionally, section 215 “does not require that the victim be or remain in the vehicle at the time of the theft. [Citation.] By its own terms, the statute applies where the vehicle is taken from the ‘immediate presence’ of the possessor or passenger. [Citations.]” (*People v. Coleman* (2007) 146 Cal.App.4th 1363, 1372.)

In this case, Anthony testified that he and Mishel went to the liquor store together, and then left the store together after purchasing some items. When Anthony realized that his car keys were missing, he returned to the store to search for the keys and to check the surveillance video. He then walked back toward his car and stopped near the vehicle with Mishel directly behind him. As Anthony approached the car, he saw that Rosas was using his keys to unlock the car door. At that point, Mishel shouted out to Rosas “that’s our car” and “give it back.” After lifting his shirt in an aggressive manner, Rosas got into the car and drove away. From this evidence, the jury reasonably could have concluded that Mishel was a passenger in Anthony’s car when they arrived at the store, and that she would have returned to her place in the car after leaving the store if Rodriguez and Rosas had not acted in concert to take the vehicle.

## **2. The Use of Force or Fear Against Mishel**

When the prosecution relies on the defendant’s use of fear to establish the force-or-fear element of carjacking, “it ‘is not necessary that there be direct proof of fear.’ [Citation.] The use of fear may be inferred from the circumstances. [Citation.]” (*People v. Gomez* (2011) 192 Cal.App.4th 609, 623, overruled on other grounds in *People v. Elizalde* (2015) 61 Cal.4th 523, 538, fn. 9.) Moreover, “[n]o express threat is necessary to establish the

victim's fear. [Citations.] . . . Indeed, the victim need not be consciously aware that the defendant is using force or fear to take possession of the vehicle for a conviction under . . . section 215 to stand. [Citation.]” (*People v. Magallanes, supra*, 173 Cal.App.4th at p. 534.) “If the defendant used force or fear, . . . he is guilty of carjacking whether or not the victim was aware of that force or fear.” (*People v. Hill, supra*, 23 Cal.4th at p. 861 [concluding that an infant inside her mother's car was a victim of a carjacking].)

Here, the evidence was sufficient to support a finding that Rosas used fear against both Anthony and Mishel to take the vehicle from their immediate presence. Anthony testified that, when he saw Rosas placing the key in the car door, Anthony was less than a foot from the vehicle and Mishel was six to eight inches behind him. Anthony did not say anything to Rosas, but Mishel repeatedly shouted, “That's our car.” Rosas did not walk away when Anthony and Mishel approached the car, or when Mishel yelled at him to “give it back.” Instead, Rosas proceeded to get into the car, and as he was doing so, he lifted his shirt. This action by Rosas caused Anthony to fear that he might have a gun. As a result, Anthony warned Mishel, “Don't do none of that, don't do anything. Anything could happen to us. We could get beat up. We don't know. We could get shot. We don't know.” Anthony then stood by as Rosas turned on the engine, put the car in reverse, and drove away. Regardless of whether Mishel actually saw Rosas lifting his shirt, the evidence supported a reasonable inference that Rosas's act was directed at both Anthony (who was silent) and Mishel (who was not), and that Rosas engaged in such conduct to instill fear in both victims as he was taking the vehicle. Because the jury reasonably could have concluded that Rosas accomplished the taking by using fear

against Mishel, Rodriguez’s conviction for the carjacking of Mishel was supported by substantial evidence.

## **II. Sufficiency of Evidence on the Gang Enhancements**

Rodriguez also challenges the sufficiency of the evidence supporting the jury’s gang enhancement findings. He contends the evidence was insufficient to show the existence of a criminal street gang within the meaning of section 186.22, subdivision (f) because the prosecution failed to prove that the Diamond Street gang committed any statutorily enumerated offenses as one of its “primary activities,” or that its members engaged in a “pattern of criminal gang activity.” Rodriguez also claims the evidence was insufficient to establish that he committed the charged offenses “for the benefit of, at the direction of, or in association with any criminal street gang,” and “with the specific intent to promote, further, or assist in any criminal conduct by gang members” within the meaning of section 186.22, subdivision (b).

### **A. Overview of Governing Law**

The Legislature enacted the California Street Terrorism Enforcement and Prevention Act expressly “to seek the eradication of criminal activity by street gangs.” (§ 186.21.) One component of the statute is a sentence enhancement for felonies committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) A “criminal street gang” is “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [§ 186.22, subd. (e)], having a common name or

common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).)

**B. The Evidence Was Sufficient to Establish the Diamond Street Gang’s Primary Activities**

To prove that a gang is a “criminal street gang,” the prosecution must show that the gang has as one of its “primary activities” the commission of one or more of the crimes enumerated in section 186.22, subdivision (e). (§ 186.22, subds. (e), (f).) “The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations,” as opposed to the occasional commission of those crimes by one or more of the group’s members. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) “The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang’s primary activities. [Citations.]” (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465.)

At trial, the prosecution offered Officer Flores’s expert testimony about the Diamond Street gang to prove the primary activities element of the gang enhancement statute. The prosecutor specifically asked Officer Flores, “Are you aware of the primary activities of the Diamond Street gang?” Officer Flores answered, “Yes.” The prosecutor then asked, “What are they?”

Officer Flores responded, “ADWs, like I mentioned earlier, assaults with a deadly weapon, robberies, extortion, batteries, murders, attempted murders.”

Rodriguez asserts that Officer Flores’s testimony was insufficient to prove the primary activities of the Diamond Street gang because he failed to provide any foundation for his opinion, and simply gave a vague, conclusory recitation of crimes allegedly committed by the gang. The record reflects, however, the Officer Flores testified about his background, training, and experience in investigating criminal street gangs, including the Diamond Street gang. At the time of trial, Officer Flores had been a police officer for more than six years and a gang officer in the Rampart Division’s gang impact section for about four years. Prior to his work as a gang officer, Officer Flores had received general training on criminal street gangs at the police academy and during an assignment in the 77th Division. Officer Flores’s current job as a gang officer was to “know the gangs assigned to [him].” The Diamond Street gang was one of four gangs that Officer Flores was responsible for monitoring, and he was familiar with the history and culture of the gang, including its territory, cliques, common signs and symbols, and current membership. Officer Flores’s knowledge of the Diamond Street gang was based on his investigations of crimes committed by the gang, his review of regularly-updated police files, and his conversations with members of the gang as well as other officers who monitored the gang’s activities. Officer Flores personally had conducted approximately 20 investigations involving the Diamond Street gang. Thus, contrary to Rodriguez’s claim, the foundation for Officer Flores’s expert opinion about the primary activities of the gang was adequately established. (*People v.*

*Martinez* (2008) 158 Cal.App.4th 1324, 1330 [expert’s “eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony” about the gang’s primary activities]; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1465 [expert’s “personal experience in the field gathering gang intelligence, contacting gang members, and investigating gang-related crimes” provided an adequate foundation for his testimony about the gang’s primary activities].)

Under these circumstances, Rodrigues’s reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, is misplaced. In that case, the appellate court reversed a true finding on a gang enhancement on the ground that the gang expert’s testimony was insufficient to establish the primary activities element. When asked about the primary activities of the defendant’s gang, the expert testified, “I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’ve been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.” (*Id.* at p. 611.) However, the expert did not explain the basis for his knowledge and conceded on cross-examination that the vast majority of crimes involving the gang were graffiti-related. (*Id.* at pp. 611-612.) As this Court explained in *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107-108, the expert testimony in *Alexander L.* was insufficient to support a gang enhancement finding because the witness did not identify the gang’s primary activities, equivocated on direct examination, and contradicted himself on cross-examination. Officer Flores’s testimony, in contrast, did not suffer from these deficiencies, and

when considered as a whole, was sufficient to establish the primary activities element of the gang enhancement statute.

**C. The Evidence Was Sufficient to Establish the Diamond Street Gang's Pattern of Criminal Gang Activity**

To prove the existence of a “criminal street gang” within the meaning of the gang enhancement statute, the prosecution also must establish that the gang’s members “individually or collectively engage in, or have engaged in, a pattern of criminal gang activity.” (§ 186.22, subd. (f).) A “pattern of criminal gang activity” means “the commission of, attempted commission of, conspiracy to commit, . . . or conviction of two or more of the [enumerated] offenses, provided . . . the offenses were committed on separate occasions, or by two or more persons” within a statutorily defined time period. (§ 186.22, subd. (e).)

To establish that the Diamond Street gang engaged in a pattern of criminal gang activity, the prosecution introduced certified court records reflecting the conviction of Hector Sanchez for a robbery on November 30, 2013, and the conviction of Moises Garcia for carrying a loaded firearm in public on June 28, 2013. Officer Flores testified that Sanchez was a self-admitted Diamond Street gang member with the moniker “Scooby,” and that Sanchez committed a robbery in gang territory while displaying a gang tattoo above his lip and making gang-related statements. Officer Flores testified that Garcia was also a self-admitted Diamond Street gang member, and that Garcia had the words “Diamond Street” tattooed on his chest. While Sanchez admitted his gang membership directly to Officer Flores, Garcia made the admission to other officers who arrested him.

Rodriguez argues that Officer Flores’s testimony about Garcia was insufficient to prove the predicate offenses required to establish a pattern of criminal gang activity because Officer Flores lacked personal knowledge of Garcia’s offense, and instead based his testimony on second-hand information obtained from police reports and other officers. In Section III below, we consider whether Officer Flores’s testimony about the predicate offenses related testimonial hearsay in violation of the Evidence Code and the Sixth Amendment confrontation clause. However, for purposes of assessing the sufficiency of the evidence to support the jury’s gang enhancement findings, we consider all of the evidence presented at trial, including any evidence that should have been excluded. (*People v. Story* (2009) 45 Cal.4th 1282, 1296 [“when reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, the reviewing court must consider *all* of the evidence presented at trial, including evidence that should not have been admitted”]; see also *People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17, 335-337 [appellate court must consider all evidence presented, including improperly admitted testimonial hearsay, in deciding whether evidence was sufficient to support gang enhancement findings].)

Here, the certified court records offered by the prosecution, along with Officer Flores’s testimony, was sufficient to support a finding that members of the Diamond Street gang, individually or collectively, engaged in a pattern of criminal gang activity. The court records showed convictions for two statutorily enumerated offenses committed on separate occasions by two or more persons within a three-year period. (§ 186.22, subd. (e).) Officer Flores opined that the individuals who committed the predicate offenses—Sanchez and Garcia—were members of the Diamond

Street gang at the time of their crimes. In explaining the basis for his opinion, Officer Flores stated that he relied, in part, on his review of police records and his conversations with other officers. He also based his opinion about Sanchez's gang membership on his prior contact with Sanchez and the facts of Sanchez's offense, and his opinion about Garcia's gang membership on Garcia's gang tattoo. In addition, Officer Flores testified that, as a Rampart Division gang officer, he was responsible for investigating crimes committed by the Diamond Street gang. This required Officer Flores to "know who the members were, what their monikers were, what their boundaries were, who their rivals were." Based on the totality of the evidence presented at trial, the evidence was sufficient to establish the pattern of criminal gang activity element of the gang enhancement statute.

**D. The Evidence Was Sufficient to Establish that the Charged Offenses Were Gang-Related and Committed with the Specific Intent to Assist Criminal Conduct by Gang Members**

To obtain a true finding on a gang enhancement allegation, the prosecution must prove the charged offense was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) The gang enhancement thus applies "when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 68.) To establish these elements of the statute, "the prosecution may . . . present expert testimony on criminal street gangs." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.) "Generally, an expert may render

opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence. . . .” (*People v. Ward* (2005) 36 Cal.4th 186, 209.) While an expert may not ordinarily testify whether the defendant committed a particular crime for the benefit of a gang or with the specific intent to facilitate criminal conduct by gang members, the expert “properly could . . . express an opinion, based on hypothetical questions that tracked the evidence, whether the [crime], if the jury found it in fact occurred, would have been for a gang purpose.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In this case, there was substantial evidence connecting the carjacking committed by Rodriguez and Rosas to the Diamond Street gang. The jury heard evidence that both Rodriguez and Rosas were long-term members of the gang, and had prominent gang tattoos signifying their gang affiliation. While Rosas had been involved in the Diamond Street gang for about 10 years, Rodriguez had been a member for almost 30 years and considered himself to be a shot caller in the gang. The liquor store where the carjacking took place was in the gang’s claimed territory. The jury also heard evidence that Rodriguez and Rosas each had a specific role in the carjacking consistent with their status in the gang. While the shot caller, Rodriguez, took Anthony’s car keys, Rosas “put in work” for the gang by taking Anthony’s car. In addition, the jury heard evidence that both Rodriguez and Rosas acted in a menacing manner during the commission of the crime. Anthony testified that Rodriguez began staring at him and Mishel even before they entered the store, and that he felt like Rodriguez was “dogging” him throughout the time he was there. In describing Rodriguez’s conduct, Anthony stated that he could

tell when a person's stare was "gang related." Anthony further testified that, when he first saw Rosas near his car, he noticed that Rosas had a "weird" facial tattoo. While Rosas never said anything, his act of lifting his shirt in an aggressive manner caused Anthony to fear that he and Mishel could be shot if they made any attempt to resist.

On appeal, Rodriguez asserts that the carjacking could not have been gang-related or intended to aid any criminal conduct by gang members because there was no evidence that he or Rosas made any gang signs, called out any gang names, or otherwise announced their gang affiliation during the offense. Although it is true that Anthony did not identify Rosas or Rodriguez as having any gang tattoos, he testified that he recalled seeing the distinct tattoo on Rosas's face and another tattoo on Rosas's stomach when he lifted his shirt. Anthony also referred to the individuals who took his car as "gangsters" in his 911 call reporting the crime. Furthermore, Officer Flores testified that gang members did not always announce their gang affiliation when committing gang crimes, and that they might instead use their prominently displayed gang tattoos to send a non-verbal message that "they are part of that gang and . . . are to be feared." Given that the carjacking involved two Diamond Street gang members acting in concert in their gang's territory, the jury reasonably could have concluded that it was committed with the specific intent to promote, further, or assist criminal conduct by members of that gang. (*People v. Albillar, supra*, 51 Cal.4th at p. 68 ["if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal

conduct by those gang members”]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [“[c]ommission of a crime in concert with known gang members . . . supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime”].)

The jury also heard Officer Flores’s expert testimony that, based on a hypothetical drawn from the evidence in this case, the carjacking would have been committed for the benefit of, at the direction of, and in association with the Diamond Street gang. Officer Flores explained that a shot caller in the gang would not have to personally commit a violent crime such as carjacking to establish his reputation because he would have already achieved notoriety within the gang. Instead, the shot caller could take the victim’s car keys and then direct a less senior gang member to commit the act of violence by taking the victim’s car through the use of force or fear. Officer Flores further opined that a gang member’s commission of a violent crime such as carjacking would instill fear in the community and deter victims from reporting gang-related crimes. Such acts of violence also would serve to enhance the reputation of the gang and its individual members, and enable the gang to continue pursuing its criminal activities with a sense of impunity. (*People v. Albillar, supra*, 51 Cal.4th at p. 63 [“[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was ‘committed for the benefit of . . . a [ ] criminal street gang’”].)

Based on the totality of this evidence, the jury reasonably could have concluded that Rodriguez committed the charged offenses for the benefit of, at the direction of, or in association with the Diamond Street gang, and with the specific intent to

promote, further, or assist in criminal conduct by its members. The jury's true findings on the gang enhancement allegations were therefore supported by substantial evidence.

### **III. Admissibility of the Gang Expert Testimony**

Rodriguez next contends that, under the California Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), the admission of Officer Flores's expert testimony violated California hearsay law and the Sixth Amendment right of confrontation. Rodriguez specifically claims that Officer Flores improperly related case-specific, testimonial hearsay in opining about the predicate offenses required to establish the pattern of criminal gang activity element of the gang enhancement statute. Based on the legal principles set forth in *Sanchez*, we conclude the trial court erred in admitting Officer Flores's testimony about the predicate offenses, and that the error was not harmless under the circumstances of this case.

#### **A. The *Sanchez* Decision**

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the Sixth Amendment right of confrontation bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford, supra*, at pp. 53-54.) In *Sanchez*, the California Supreme Court considered the extent to which *Crawford* limits an expert witness from relating case-specific hearsay in explaining the basis for an opinion, and

addressed the proper application of California hearsay law to the scope of expert testimony. (*Sanchez, supra*, 63 Cal.4th at p. 670.) The *Sanchez* court held that the case-specific out-of-court statements related by the prosecution’s gang expert constituted inadmissible hearsay under California law; where those statements were testimonial in nature, they also should have been excluded under *Crawford*. (*Id.* at pp. 670-671.)

In *Sanchez*, the prosecution’s gang expert testified about his background, training, and experience as a gang suppression officer. He also testified about the gang to which the defendant allegedly belonged, including the gang’s primary activities and its pattern of criminal activity. As to the defendant specifically, the expert testified about the prior contacts the defendant had with the police, as reflected in police reports, a California Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.; STEP) notice, and a field identification (FI) card. The expert was not present during any of the defendant’s police contacts and only related the information recorded by other officers. Based on such information, the expert opined that the defendant was a gang member. The jury found the defendant guilty of the underlying charge and made a true finding on the related gang enhancement allegation. (*Sanchez, supra*, 63 Cal.4th at pp. 671-673.) On appeal, the defendant challenged the expert’s testimony about his prior police contacts, contending that it was based on testimonial hearsay in violation of the confrontation clause. (*Id.* at p. 674.)

With respect to California hearsay law, the *Sanchez* court drew a distinction between “an expert’s testimony regarding his general knowledge in his field of expertise,” and “case-specific facts about which the expert has no independent knowledge.” (*Sanchez, supra*, 63 Cal.4th at p. 676, italics omitted.) “Case-

specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Ibid.*) Traditionally, “an expert’s testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.” (*Ibid.*) Thus, “[g]ang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception.” (*Id.* at p. 685.) On the other hand, “[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.” (*Id.* at p. 686.) “If an expert testifies to case-specific out-of-court statements to explain the bases for his [or her] opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.” (*Id.* at p. 684.)

With respect to the confrontation clause, the *Sanchez* court concluded that, if an expert relates to the jury case-specific out-of-court statements that constitute “*testimonial*” hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.”

(*Sanchez, supra*, 63 Cal.4th at p. 686.) Citing post-*Crawford* United States Supreme Court precedent, the *Sanchez* court defined “[t]estimonial statements” as “those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.” (*Id.* at p. 689.) The court defined “[n]ontestimonial statements” as “those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial.” (*Ibid.*)

Turning to the facts of the case, the *Sanchez* court held that the gang expert’s testimony about the defendant’s membership in a gang conveyed case-specific testimonial hearsay in violation of state hearsay law and the confrontation clause. First, the police reports prepared by other officers documenting the defendant’s prior contacts with the police were testimonial hearsay because they related “statements about a completed crime, made to an investigating officer by a nontestifying witness” during an official investigation. (*Sanchez, supra*, 63 Cal.4th at p. 694.) Second, the STEP notice was testimonial hearsay because it was an official police document that “recorded [the] defendant’s biographical information, whom he was with, and what statements he made,” and the officer who recorded the information did so primarily “to establish facts to be later used against [the defendant] or his companions at trial.” (*Id.* at p. 696.) Finally, the court noted that the record did not sufficiently disclose the circumstances surrounding the preparation of the FI card to determine whether it was testimonial hearsay, but “[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial.” (*Id.* at p. 697.)

**B. Officer Flores's Testimony About the Diamond Street Gang's Alleged Predicate Offenses**

Prior to Officer Flores's testimony, the trial court discussed with counsel the permissible scope of the officer's testimony under *Sanchez*. The prosecutor asserted that *Sanchez's* limits on hearsay testimony "applies to whether these defendants here in court are in a gang, . . . not as to the predicates." In response, the court stated: "I sort of agree with that. . . . [T]he actual language they use is you're not allowed to bring in case specific hearsay. And it's largely that you're not allowed to bring in hearsay that would show these people were gang members without laying a foundation and bringing in someone who knows it. . . . But as to the predicates I sort of agree because *Sanchez* goes on to say that experts may still rely on and use hearsay to talk about gangs in general. And I think the predicate stuff is sort of gangs in general." Counsel for Rodriguez and counsel for Rosas joined in objecting to the proffered testimony under *Sanchez*. Rosas's counsel, in particular, argued that Officer Flores should not be allowed to base his testimony about the predicate offenses on hearsay, stating: ". . . I have knowledge that what [Officer Flores] intends on doing is bringing in the predicate and the fact that the person on the predicate specifically is a gang member, and that is all relying upon hearsay. And it is my position that . . . it is case specific." The court responded: "I disagree, so I'm going to allow that over your objection. That's my ruling."

As previously discussed, during Officer Flores's testimony, the prosecution introduced certified court records regarding a robbery offense committed by Hector Sanchez on November 30, 2013, and a firearm offense committed by Moises Garcia on June 28, 2013. The prosecutor then asked Officer Flores whether he was familiar with Sanchez and Garcia, and whether, in his expert

opinion, each of these individuals was a member of the Diamond Street gang.

With respect to Sanchez, the record reflects the following exchange between the prosecutor and Officer Flores:

Q Officer Flores, are you aware of Hector Sanchez?

A Yes, I am.

Q How do you know Hector Sanchez?

A I've met with him in the field. I detained him, or stopped him for—it was a radio call for, I believe it was drinking in public, as well as vandalism. We had conversation in which he admitted himself to be a Diamond Street gang member with the moniker of "Scooby." I've spoken with other officers about Hector Sanchez, other gang officers about Hector Sanchez, and I reviewed an arrest report—a crime and arrest report in which Hector Sanchez was the defendant.

Q Do you have an opinion as to whether Hector Sanchez is or was a member of the Diamond Street gang?

A Yes, I do.

Q Do you have an opinion as to whether he was a member at the time the 211 robbery was committed?

A Yes.

Q What is that opinion?

A That yes, he was a gang member at the time of the robbery.

Q And what is the basis of that opinion?

A The fact that he was in Diamond Street territory, as well as the Diamond Street tattoo just above his lip, the fact that he asked the pizza delivery boy if he knew where he was at, referring to the fact that the pizza boy was in the Diamond Street territory. Again, threatening to stab the pizza driver. All of

those listed above is my opinion as to, yes, he was a Diamond Street gang member during the commission of the robbery.

With respect to Garcia, the prosecutor had the following exchange with Officer Flores:

Q Officer, are you aware of a Moises Garcia?

A Yes.

Q And do you have an opinion as to whether Moises Garcia is a member of the Diamond Street gang?

A Yes, I do.

Q What is that opinion based on?

A The fact he admitted to the arresting officers the day that he was arrested that he was a member, L.A.P.D. files, and the field I.D. cards which are filled out in which he also self admitted as to being a Diamond Street gang member.

Q At the time this crime was committed, the one that I just spoke about in People's 3 [the certified court record], do you have an opinion as to whether Mr. Garcia was a member of Diamond Street gang at the time that crime was committed?

A Yes.

Q And what is that opinion?

A It's based on his self admission to the arresting officers as well as his Diamond Street tattoos during the time of the crime.

Q And your opinion as to whether he was a member at the time is what?

A Yes, that he was a Diamond Street gang member at the time.

The Court: What did you mean by his Diamond Street tattoos?

The Witness: He has a tattoo on his chest which says “Diamond Street.”

**C. The Trial Court Erred in Ruling on the Admissibility of Officer Flores’s Expert Testimony on the Predicate Offenses**

Rodriguez argues that Officer Flores impermissibly relied on case-specific, testimonial hearsay in opining that Sanchez and Garcia were Diamond Street gang members because his opinion was based on out-of-court statements contained in police records, FI cards, and other official law enforcement documents and were offered to prove the truth of the matters asserted therein. The Attorney General acknowledges that certain aspects of Officer Flores’s testimony were based on hearsay, but asserts that such testimony was admissible because it did not convey case-specific facts within the meaning of *Sanchez*.

As noted, the *Sanchez* court defined case-specific facts as “those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) Since *Sanchez*, there has been a split of authority among appellate courts as to whether a gang expert’s testimony about predicate offenses offered to establish a gang’s pattern of criminal gang activity entails “case-specific facts” within the meaning of *Sanchez*. Some courts have concluded that facts pertaining to predicate offenses are necessarily case specific, and therefore subject to the requirement that the expert not relate hearsay statements in testifying about those facts. (See *People v. Lara, supra*, 9 Cal.App.5th at p. 337; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 583, 588-589 (*Ochoa*)). Other courts have indicated that facts concerning predicate offenses are more appropriately characterized as general background

information about which a qualified gang expert is permitted to testify, even if that testimony is based on hearsay sources. (See *People v. Blessett* (2018) 22 Cal.App.5th 903, 943-945 (*Blessett*), review granted Aug. 8, 2018, S249250; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 (*Vega-Robles*); *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174-1175 (*Meraz*), review granted Mar. 22, 2017, S239442, opn. ordered to remain precedential.)<sup>4</sup>

In our view, Officer Flores’s testimony about the Diamond Street gang’s alleged predicate offenses entailed case-specific facts as defined in *Sanchez*. To prove the elements of the gang enhancement allegations, the prosecution was required to establish the existence of a criminal street gang, which, in turn,

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<sup>4</sup> While the appellate courts in each of the above-cited cases stated, in general terms, that a gang expert’s scope of permissible background testimony includes testimony about a gang’s pattern of criminal activity, only the *Blessett* decision directly addressed whether facts about predicate offenses were case specific within the meaning of *Sanchez*, and it did so in the context of analyzing a claim for ineffective assistance of counsel. (*Blessett, supra*, 22 Cal.App.5th at pp. 942, 945.) *Meraz* broadly stated that a gang expert may “testify to non-case-specific general background information about [a gang’s] . . . pattern of criminal activity, even if it was based on hearsay sources”; however, it also noted that the expert in that case “conveyed no specific statements by anyone with whom he spoke, and reached only general conclusions based on his education, training, and experience.” (*Meraz, supra*, 6 Cal.App.5th at p. 1175.) *Vega-Robles* did not discuss the expert’s testimony about the predicate offenses at all, and instead, simply quoted *Meraz* for the proposition that a gang expert may rely on “general background testimony” about the conduct of a gang, which includes “background testimony” about the gang’s “pattern of criminal activities.” (*Vega-Robles, supra*, 9 Cal.App.5th at p. 411.)

required a showing that members of the Diamond Street gang engaged a pattern of criminal gang activity. (§ 186.22, subds. (a)-(f).) The prosecution sought to prove the pattern of criminal activity element with evidence that two members of the Diamond Street gang—Sanchez and Garcia—each committed a predicate offense within the statutory period. Accordingly, Officer Flores’s testimony that Sanchez and Garcia were Diamond Street gang members at the time they committed the predicate offenses was specifically offered to prove an element of the gang enhancement allegations. Under these circumstances, Officer Flores’s proffered opinion about the respective gang memberships of Sanchez and Garcia cannot be fairly described as background information; that is, “testimony regarding [the officer’s] general knowledge in his field of expertise.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) Rather, Officer Flores’s testimony on this subject matter was case specific. (See *id.*, at pp. 676-677.)

We therefore consider whether Officer Flores related any testimonial hearsay in opining that Sanchez and Garcia were Diamond Street gang members. Under the Evidence Code, the proponent of proffered evidence “has the burden of producing evidence as to the existence of the preliminary fact . . . when [¶] . . . [t]he preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony.” (Evid. Code, § 403, subd. (a)(2).) Where the defendant objects to proffered evidence as hearsay, it is “the prosecution’s burden, as proponent of the challenged evidence, to establish its admissibility.” (*People v. Dungo* (2012) 55 Cal.4th 608, 647; see also *People v. Morrison* (2004) 34 Cal.4th 698, 724 [where proffered testimony is comprised of hearsay, the proponent of the evidence “has the burden of establishing . . . the foundational requirements for its

admissibility under an exception to the hearsay rule”].) Additionally, where the defendant raises a confrontation clause objection to proffered testimony, the prosecution, “as the proponent of the evidence, . . . ha[s] the burden to show the challenged testimony did not relate testimonial hearsay.” (*Ochoa*, *supra*, 7 Cal.App.5th at p. 584, citing *Idaho v. Wright* (1990) 497 U.S. 805, 816 [state has burden of proof regarding admissibility under the confrontation clause].) In this case, Rodriguez raised a timely objection to Officer Flores’s testimony about the predicate offenses on the ground that it violated the limits set forth in *Sanchez*. As the proponent of this testimony, it was the People’s burden to establish that the evidence did not relate testimonial hearsay in violation of California hearsay law and the confrontation clause. Based on the record before us, we conclude that the People did not meet their burden here.<sup>5</sup>

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<sup>5</sup> Although Rodriguez did not specifically object to Officer Flores’s proffered testimony about the predicate offenses on confrontation clause grounds, defense counsel did argue that the testimony was inadmissible under *Sanchez* because it was based on case-specific hearsay. Because the trial court ruled that the proffered testimony did not relate case-specific hearsay, it effectively precluded any objection that such testimony also related testimonial hearsay in violation of the confrontation clause. This case is therefore distinguishable from *Ochoa* where the defendant did not object to the expert’s testimony about predicate offenses on either hearsay or confrontation clause grounds. (*Ochoa*, *supra*, 7 Cal.App.5th at pp. 584, 588.) The appellate court in *Ochoa* thus concluded that, due to the defendant’s failure to raise any objection that the expert’s testimony violated his right to confrontation, the burden never shifted to the People to prove that the challenged evidence complied with the confrontation clause. (*Id.* at pp. 584-586.)

With respect to Sanchez, the record shows that Officer Flores identified four categories of information on which he based his opinion about Sanchez's gang membership: (1) Sanchez's admission to Officer Flores that he was a Diamond Street gang member during a detention for public drinking and vandalism; (2) conversations with other gang officers about Sanchez; (3) a crime and arrest report for Sanchez; and (4) Sanchez's commission of a robbery in Diamond Street gang territory while displaying a Diamond Street gang tattoo and making a gang-related statement to the victim. With respect to Garcia, Officer Flores also identified four sources of information for his opinion about Garcia's gang membership: (1) Garcia's admission to the officers that arrested him that he was a Diamond Street gang member; (2) L.A.P.D. files; (3) FI cards documenting Garcia's admission of gang membership; and (4) Garcia's tattoo of the words "Diamond Street" on his chest.

**1. Arrest Reports, Police Files, and  
Conversations with Other Officers**

Officer Flores's testimony that he was aware of Sanchez from his conversations with other gang officers and his review of an arrest report did not improperly relate any hearsay. Likewise, Officer Flores's testimony that he based his opinion about Garcia's gang membership, in part, on "L.A.P.D files" did not implicate the hearsay rule. As the Supreme Court explained in *Sanchez*, while "an expert cannot . . . relate as true case-specific facts asserted in hearsay statements," the expert "may still rely on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at pp. 685, 686.) An expert also may tell the jury "generally the kind and source of the 'matter' upon which his opinion rests" so

that the jury can “independently evaluate the probative value of an expert’s testimony.” (*Id.* at p. 686.) Officer Flores thus could testify in general terms that he relied on conversations with other officers and on written records such as an arrest report and police files in forming his opinion about the respective gang memberships of Sanchez and Garcia.

## **2. Admissions of Gang Membership**

On the other hand, Officer Flores’s testimony that Sanchez admitted to Officer Flores that he was a Diamond Street gang member conveyed hearsay because Sanchez’s admission was an out-of-court statement offered for the truth of the matter asserted, i.e., to establish Sanchez’s membership in the Diamond Street gang. Similarly, Officer Flores’s testimony about Garcia’s admissions of gang membership to the arresting officers and in FI cards also related hearsay because Garcia’s out-of-court statements were offered, as true, to prove that he was a Diamond Street gang member. These respective statements by Sanchez and Garcia were not admissible as declarations against penal interest (Evid. Code, § 1230) because there was no showing that the declarant was unavailable to testify. There also was no showing that the statements were admissible under any other exception to the hearsay rule. Accordingly, the case-specific, out-of-court admissions made by Sanchez and Garcia about their gang membership constituted inadmissible hearsay under California law. (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247 [gang associate’s out-of-court admissions to testifying officers that he was an Inglewood 13 gang member were hearsay]; *People v. Ochoa, supra*, 7 Cal.App.5th at p. 583 [gang expert’s testimony that certain individuals had admitted they were SSL gang members related inadmissible hearsay].)

The record does not, however, contain sufficient information to ascertain whether these admissions of gang membership were testimonial. With respect to Sanchez, Officer Flores testified that he detained Sanchez for vandalism and drinking in public, and that, during their conversation, Sanchez admitted he was a Diamond Street gang member with the moniker “Scooby.” The record does not disclose any other details about Sanchez’s admission, and thus, it cannot be determined whether it was made as part of an ongoing criminal investigation or was obtained by Officer Flores for the primary purpose of use in a later criminal prosecution. (*Sanchez, supra*, 63 Cal.4th at p. 694.) With respect to Garcia, Officer Flores testified that Garcia admitted his membership in the gang to the officers who arrested him, and that FI cards documented that Garcia was a self-admitted Diamond Street gang member. The record does not contain any other information about Garcia’s admissions or how they were used by the officers who received them. While *Sanchez* concluded that an FI card can be testimonial if produced in the course of an ongoing criminal investigation, it also made clear the determination would depend on the specific circumstances under which the FI card was prepared. (*Id.* at p. 697.) Neither Officer Flores nor any other witness testified about how FI cards were prepared in general or in Garcia’s case in particular. As the proponent of the evidence, the People had the burden of showing that these out-of-court admissions of gang membership were not testimonial hearsay. Because the People did not meet their burden, the evidence should have been excluded.

### **3. Facts Pertaining to the Predicate Offenses**

The final category of information on which Officer Flores relied in opining about the gang membership of Sanchez and

Garcia were case-specific facts related to the predicate offenses. When asked for the basis of his opinion that Sanchez was a Diamond Street gang member when he committed the predicate offense of robbery, Officer Flores testified about the underlying facts of the crime. He stated that it occurred in Diamond Street territory, that Sanchez had a Diamond Street tattoo on his face, and that Sanchez made a gang-related threat to the victim. When asked for the basis of his opinion that Garcia was a member of the gang when he committed the predicate offense of carrying a loaded firearm in public, Officer Flores testified that his opinion was based, in part, on Garcia's Diamond Street tattoo at the time of the crime. Officer Flores did not explain, however, how he knew any of these case-specific facts. There is no indication in the record that Officer Flores was involved in investigating the crimes or in arresting Sanchez or Garcia for their respective offenses. While Officer Flores testified that he reviewed a crime and arrest report in which Sanchez was the defendant, he did not state whether his knowledge of the facts of the robbery was based on that report. Officer Flores also did not disclose whether his familiarity with Garcia's gang tattoo came from his review of the police files and FI cards related to Garcia or from his own personal observation of that tattoo.

As the Supreme Court explained in *Sanchez*, “[g]enerally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts

about which he has no personal knowledge. [Citation.]” (*Sanchez, supra*, 63 Cal.4th at p. 676.) “If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it.” (*Id.* at p. 677.)

Here, the record is silent as to whether Officer Flores had any independent knowledge of the case-specific facts pertaining to the predicate offenses, or solely gathered those facts from the police records that he reviewed. If, in testifying about Sanchez’s gang-related conduct during the robbery, Officer Flores simply recited information that he read in reports prepared by other officers and about which he had no personal knowledge, then his testimony conveyed case-specific hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 694 [gang expert’s testimony about defendant’s prior contacts with the police related hearsay because it was based on information in police reports prepared by other officers].) Similarly, if in testifying about Garcia’s gang tattoo, Officer Flores solely relied on a statement in a police file rather than on his own observation of the tattoo (whether in person or in photographs), then his description of the tattoo conveyed case-specific hearsay. (*Sanchez, supra*, 63 Cal.4th at p. 677 “[t]hat an associate of the defendant had a diamond tattooed . . . would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph”].) However, because Officer Flores was not asked to identify the source of his knowledge about these case-specific facts, we cannot determine whether any part of his testimony related inadmissible hearsay. Given the undeveloped record, we also cannot determine whether any hearsay statements that Officer Flores may have related to the jury about the predicate offenses were testimonial in nature.

As discussed, the People had the burden of establishing the admissibility of Officer Flores's testimony under both state law and the confrontation clause. Because the People failed to satisfy their burden, Officer Flores's testimony conveying to the jury case-specific facts about the respective gang memberships of Sanchez and Garcia should not have been admitted.

#### **D. The Error Was Not Harmless**

The erroneous admission of nontestimonial hearsay is a violation of state statutory law subject to the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Sanchez, supra*, 63 Cal.4th at pp. 685, 698.) Under this standard, reversal is required only if it is reasonably probable that the defendant would have achieved a more favorable result if not for the error. (*People v. Wall* (2017) 3 Cal.5th 1048, 1060.) The erroneous admission of case-specific testimonial hearsay in violation of a defendant's right of confrontation is "an error of federal constitutional magnitude," and requires reversal unless the error is "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*Sanchez, supra*, at pp. 685, 698.)

In this case, we apply the *Chapman* standard because the prosecution failed to meet its burden of establishing that its gang expert's testimony did not relate testimonial hearsay in violation of the confrontation clause. Applying this standard, we conclude that the error in admitting Officer Flores's testimony about the predicate offenses was prejudicial. For the reasons discussed above, it appears a significant portion of the officer's testimony on this subject matter was inadmissible. Officer Flores clearly related case-specific hearsay in testifying about the out-of-court admissions made by Sanchez and Garcia about their respective

memberships in the Diamond Street gang. These inadmissible hearsay statements included Sanchez's admission to Officer Flores, Garcia's admission to the arresting officers, and Garcia's admission in the FI cards. Depending upon the circumstances in which the admissions were made, they also may have been testimonial. Additionally, Officer Flores may have related case-specific testimonial hearsay when he testified about Sanchez's and Garcia's respective gang tattoos, and when he recounted Sanchez's other gang-related conduct during the robbery. All of these case-specific facts, which Officer Flores asserted to be true, substantially formed the basis of his opinion that both Sanchez and Garcia were Diamond Street gang members at the time they committed the predicate offenses.

The record further reflects that the prosecution relied exclusively on Officer Flores's testimony about the predicate offenses to establish the pattern of criminal activity element of the gang enhancement allegations. Sanchez's robbery offense and Garcia's firearm offense were the only crimes that the prosecution used to show that members of the Diamond Street gang engaged in a pattern of criminal gang activity by committing two or more predicate offenses. The jury also was instructed that the term "pattern of criminal gang activity" meant "the commission of, or attempted commission of, or sustained juvenile petition for, or conviction of two or more of the following crimes, namely Robbery and Carrying a Loaded Firearm in Public. . . ." The jury was not instructed that it could consider the defendants' crimes in this case, or any other crimes, in deciding whether the prosecution had proven the requisite predicate offenses. We presume that the jury followed the instruction. (*People v. Scott* (2015) 61 Cal.4th 363, 399.)

Without Officer Flores's testimony that members of the Diamond Street gang committed two or more predicate offenses, the prosecution could not establish the pattern of criminal gang activity element of the gang enhancement allegations. Under these circumstances, we cannot conclude beyond a reasonable doubt that the jury would have found the gang enhancement allegations to be true had Officer Flores's testimony about the predicate offenses been properly excluded. The jury's true findings on the gang enhancements alleged against Rodriguez must accordingly be reversed.

#### **IV. Motion for Mistrial**

Rodriguez argues that the trial court prejudicially erred in denying his motion for mistrial based on Officer Flores's testimony that he once spoke with Rodriguez and Rosas regarding a vandalism investigation. Rodriguez asserts that Officer Flores's testimony on this issue constituted inadmissible propensity evidence and violated his constitutional right to due process and a fair trial.

##### **A. Relevant Background**

At trial, the prosecution sought to present evidence that, on October 18, 2015, Officer Flores saw Rodriguez and Rosas together when he detained them for a vandalism investigation involving spray cans. Rodriguez and Rosas were questioned and then released. After hearing the proffered testimony outside the presence of the jury, the trial court ruled that it would allow Officer Flores to testify that he saw Rodriguez and Rosas together, but would not permit any testimony about the nature or details of the investigation. The court explained: "As to the event on October 18th, I would allow that in minimally to

indicate that he saw them together and then nothing else, that he saw . . . the two of them together. No evidence about that it's a vandalism investigation, no evidence about . . . obtaining spray cans or anything like that. Although he personally saw this, . . . it's 352; it's not relevant. It's more prejudicial than probative. But he can bring in [the date]. . . . That is relevant to show that there is a relationship between these two people, and for that minimal purpose I would allow that in, and that bolsters the opinion of the gang expert that they may have done this together, they work together, they had prior contact." The court then asked Officer Flores if he understood its ruling. The officer answered that he did.

When the prosecutor resumed his examination of Officer Flores in front of the jury, they had the following exchange:

Q Have you ever seen defendant Rosas and defendant Rodriguez together at the same time before this case?

A Yes.

Q When was that?

A In approximately October of 2015.

Q And what kind of contact did you have with them?

A We had stopped to speak with them regarding a vandalism investigation.

Rodriguez's counsel immediately objected to the testimony, and the trial court sustained the objection. At a sidebar conference, the trial court inquired of the prosecutor: "Mr. Davis, what is wrong with you? . . . I told you not to bring that up. Why did you ask that question? . . . All you needed to bring up was that he saw them together.

Rodriguez's counsel moved for a mistrial, arguing that Officer Flores's reference to a vandalism investigation constituted

propensity evidence, and that the cumulative effect of all of the gang evidence presented by the prosecution was prejudicial. The trial court denied the motion. The court explained that Officer Flores’s testimony, though improper, was not propensity evidence because he “said they stopped them for a vandalism investigation,” not that “they were convicted of anything or that they’re criminals.”

Immediately after denying the motion, the court instructed the jury as follows: “Ladies and gentlemen, regarding the last statement by the officer, I just want to indicate to the jury so you don’t speculate there was no charges out of that investigation. There was no case that occurred as a result of that investigation . . . . The officer merely had contact with them in connection with an investigation. Does everybody understand what I have said?” The jurors answered in the affirmative.

## **B. Relevant Law**

“[W]e review a ruling on a motion for mistrial for an abuse of discretion, and such a motion should be granted only when a party’s chances of receiving a fair trial have been irreparably damaged.” (*People v. Ayala* (2000) 23 Cal.4th 225, 283.) Stated otherwise, “[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. . . .’ [Citation.] . . .” [Citation.]’ [Citation.]” (*People v. Harris* (2013) 57 Cal.4th 804, 848.)

As a general matter, application of the ordinary rules of evidence does not impermissibly infringe on a defendant’s constitutional rights. (*People v. Lindberg* (2008) 45 Cal.4th 1,

26.) “To prove a deprivation of federal due process rights, [the defendant] must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. ‘Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must “be of such quality as necessarily prevents a fair trial.” [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.’ [Citation.]” (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 229.) Hence, “[t]he admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant’s trial fundamentally unfair.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

**C. The Trial Court Did Not Abuse Its Discretion in Denying the Motion for Mistrial**

Rodriguez contends that the trial court erred in denying his motion for mistrial because Officer Flores’s testimony that he detained the defendants regarding a vandalism investigation constituted highly prejudicial propensity evidence. Rodriguez also asserts that the trial court’s admonition to the jury did not cure the prejudice, but rather served to reinforce Officer Flores’s testimony that the defendants had engaged in prior criminal gang activity. This argument lacks merit.

“Evidence of a person’s character, also known as propensity evidence, is inadmissible to prove conduct in conformity with that character trait. [Citation.]” (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1170, *italics omitted*.) Thus, evidence of other crimes generally cannot be admitted to prove a defendant is disposed to commit crimes. (Evid. Code, § 1101, subd. (a); *People v. Chism*

(2014) 58 Cal.4th 1266, 1306.) In this case, Officer Flores's testimony did not constitute inadmissible propensity evidence. Officer Flores did not testify that the defendants committed any other crimes, either individually or together. Rather, Officer Flores testified that, on one prior occasion in 2015, he saw the defendants together and "stopped to speak to them regarding a vandalism investigation." This testimony about seeing the defendants together on a prior occasion was relevant to the current case because it showed that they knew one another. Given that no witness saw Rodriguez and Rosas together on the night of the carjacking, evidence that they knew each other was probative of whether they could have acted together to take Anthony's car.

It is true, as the trial court found, that Officer Flores's reference to a vandalism investigation directly violated its ruling that the officer could testify about seeing the defendants together, but could not mention that it was related to any type of criminal investigation. However, the court's admonition to the jury cured any potential prejudice. The court made clear to the jury that the investigation did not result in any charges against Rodriguez or Rosas, and that Officer Flores "merely had contact with them in connection with an investigation." Under these circumstances, Officer Flores's brief and isolated reference to a vandalism investigation did not render the trial fundamentally unfair, and the trial court acted well within its discretion in denying the motion for mistrial.

## **V. Prosecutorial Misconduct in Misstating the Law**

Rodriguez asserts that the prosecutor committed prejudicial misconduct during closing argument by misstating the applicable standard of proof. He specifically contends

that the prosecutor improperly compared the standard of proof beyond a reasonable doubt to the jury's ability to recognize an iconic image on a jigsaw puzzle. He also claims that the prosecutor incorrectly suggested that the burden of proof could be met based on a reasonable account of the evidence.

#### **A. Relevant Background**

Prior to closing argument, the trial court instructed the jury on the applicable law. Among other instructions, the court gave CALJIC No. 2.90 on the burden of proof: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

The court also gave CALJIC No. 2.01 on circumstantial evidence, which provided, in relevant part: "[A] finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been

proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.”

In his closing argument, the prosecutor described the standard of proof beyond a reasonable doubt as follows: “Reasonable doubt. By how much do the People have to prove this? What we know about reasonable doubt is that it’s reasonable. It’s based on the entire comparison and consideration of all the evidence. You don’t just look at one little thing and put blinders on to the rest, and then look at another little thing and put blinders on to the rest. You have to look at all of the evidence together and how it all relates together, and your job as a juror is to figure out the truth, to figure out what happened. It is not beyond all possible doubt. It’s not beyond an imaginary doubt, not beyond a shadow of a doubt. Because all things are going to have some doubt to it. You can still find someone guilty beyond a reasonable doubt and still have some doubt as long as it’s beyond a reasonable doubt.”

In her closing argument, Rosas’s counsel showed the jury a demonstrative chart that compared the different standards of proof depending on the type of legal action at issue. The chart listed, from bottom to top, the standards of reasonable suspicion, probable cause, preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt. Counsel noted that the standard of clear and convincing evidence was “the amount of evidence that a judge needs to take a child away from a parent,” or “to take a person off life support and end that person’s life.” She then stated: “That’s a lot of evidence that you need to do those two prominent things in life, and even that is lower than proof beyond a reasonable doubt.” Rosas’s counsel

returned to this theme near the end of her argument. She asked the jury to imagine that their child was comatose and the child's doctor recommended the child be taken off life support, but refused to show the parents the results of any diagnostic tests or to allow for a second opinion. Counsel then asked the jury: "Would you think that that is enough to take your child off life support? I guarantee that it's not enough. And at a minimum you would want a second opinion. That means that you are not even convinced to the clear and convincing standard, so how can you be convinced beyond a reasonable doubt in this case? That is how high the standard is."

During her closing argument, Rodriguez's counsel endorsed this comparison. Counsel told the jury: "Now, I loved what [Rosas's counsel] used . . . with the burden of proof, and I accept everything that she said to you. And what I want to remind you of is that you need to go beyond. Once you get to reasonable doubt, you have to get beyond reasonable doubt in order to get to guilty so you don't stop there. Once you get to reasonable doubt and there are all these reasons that you should have doubt." At the end of her argument, Rodriguez's counsel returned the burden of proof, stating: "Now the prosecution is going to get another opportunity to speak to you, and that's because he does have this very, very high burden of proof beyond a reasonable doubt, higher than clear and convincing, which is what . . . a judge needs in order to end a life, terminate parenting, a very high burden."

In his rebuttal, the prosecutor disputed the defense's characterization of the standard of proof. The prosecutor stated: "The defense talked a lot about our burden of proof. Okay? And . . . they're trying to make our burden out to be something that

is much larger than it actually is. Okay? They brought it up multiple times. Those charts. You saw those charts. That was made by defense counsel. That's not anywhere in the jury instructions. Defendants are convicted on the same standard [of] beyond a reasonable doubt every day across the country, but defense counsel wants you to believe that it's this unattainable standard. . . . All it is, does it leave you with an abiding conviction?"

The prosecutor then asked the jury to imagine putting together a jigsaw puzzle of Big Ben. The prosecutor stated: "When you are doing a jigsaw puzzle, there's a certain point where you can see the picture, and you don't have all the pieces. You're like okay. That's Big Ben. I know that. I'm comfortable with saying that's Big Ben. Okay? That's – when you're comfortable, that's abiding conviction. Hey, I know what the truth is. You know, is it possible it's something else? Sure, it's possible. But that's where I'm comfortable."

Rodriguez's counsel and Rosas's counsel joined in objecting to this portion of the prosecutor's argument on the ground that it misstated the law. The trial court overruled the objection, noting that it had "allowed both of you quite a bit of leeway in your arguments, and he has leeway as well." The prosecutor then continued: "So, in fact, I'm not even going to put up a chart. I'll put up the exact rule for you to see. You will have it in your packet. . . . [I]t's not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. What it comes down to is abiding conviction of the truth of that charge. That's the law."

In his rebuttal, the prosecutor also argued to the jury that Anthony's testimony was credible and consistent with someone

who had been the victim of a carjacking and was afraid of retaliation for testifying. The prosecutor stated that it was therefore “reasonable” that Anthony refused to provide copies of the threatening messages he had received. The prosecutor also noted that it was “reasonable” that an older gang member would hand off the car keys he had taken to a younger gang member to commit a carjacking because the older gang member “doesn’t do the dirty work.” Near the end of his rebuttal, the prosecutor told the jury: “Look, if you believe there’s a gun, [Rosas is] guilty of carjacking plus the gun. If you believe that, ‘Hey, there wasn’t a gun,’ or, ‘I don’t know if there’s a gun, but I know he did some aggressive act,’ he’s guilty of carjacking. . . . All of that is reasonable. And this is beyond a reasonable doubt.”

## **B. Relevant Law**

““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” [Citation.]” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.) Where, as here, “a claim of misconduct is based on the prosecutor’s comments before the jury, . . . “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) “A defendant’s conviction will not be reversed for prosecutorial misconduct’ that violates state law . . . ‘unless it is reasonably probable that a result more favorable to the

defendant would have been reached without the misconduct.’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

As the California Supreme Court explained in *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*): “Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, ‘it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].’ [Citations.] To establish such error, bad faith on the prosecutor’s part is not required. [Citation.] [‘[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]”] (*Id.* at pp. 666-667; accord, *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

In *Centeno*, the Supreme Court held that the prosecutor misstated the standard of proof during closing argument by using a diagram of California to illustrate the concept of proof beyond a reasonable doubt, and by urging the jury to find the defendant guilty based on a reasonable view of the evidence. (*Centeno, supra*, 60 Cal.4th at p. 662.) In her rebuttal argument, the prosecutor displayed a diagram showing the geographical outline of the state of California. She then asked the jury to consider a hypothetical trial in which the issue was the identity of the state, and argued that, even if there were inconsistencies, omissions, or errors in the evidence presented, the jury would have no reasonable doubt that the state was California. (*Id.* at p. 665.) The prosecutor also repeatedly suggested to the jury that a

reasonable account of the evidence was sufficient to satisfy the People's burden of proof. (*Id.* at p. 666.)

The *Centeno* court concluded that the prosecutor's diagram of California and related hypothetical were improper because they were "unrelated to the evidence" and "purport[ed] to relate the exacting process of evaluating the case to answering a simple trivia question." (*Centeno, supra*, 60 Cal.4th at p. 671.) The court also concluded that the prosecutor's argument about a reasonable account of the evidence misled the jury about the standard of proof because it "strongly implied that the People's burden was met if its theory was 'reasonable' in light of the facts supporting it." (*Ibid.*) As the court observed: "It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt. [Citation.] The prosecutor, however, left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Id.* at p. 672.)

**C. The Prosecutor's Misstatement of the Law In Closing Argument Did Not Result in Prejudice**

Rodriguez argues that the prosecutor misstated the law during his rebuttal argument by equating the jury's application of the standard of proof with the act of partially completing a puzzle and feeling comfortable that the image was of Big Ben, and by implying that a reasonable account of the evidence was sufficient to satisfy the People's burden. Rodriguez also asserts that the error was prejudicial because the trial court did not issue a curative instruction, and thus, the prosecutor's misstatements were the last word that the jury heard on the subject. We agree that the prosecutor's jigsaw puzzle analogy was improper, but

conclude that there is no reasonable likelihood the jury applied the challenged comments in an erroneous manner.

In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, the court of appeal disapproved of a puzzle analogy similar to the one used here. During closing argument, the prosecutor used a PowerPoint presentation to display pieces of a puzzle. As six pieces of the puzzle came onto the screen, the picture became “immediately and easily recognizable as the Statue of Liberty” (*id.* at p. 1264), even though two pieces were missing (*id.* at pp. 1264-1265). Over a defense objection, the prosecutor argued, “[w]e know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that’s a picture of the Statue of Liberty, we don’t need all the pieces. . . .” (*Id.* at p. 1265.) In concluding that the prosecutor’s presentation misrepresented the standard of proof, the court of appeal stated: “The Statue of Liberty is almost immediately recognizable in the prosecution’s PowerPoint presentation. Indeed, some jurors might guess the picture is of the Statue of Liberty when the first or second piece is displayed . . . [and] . . . most jurors would recognize the image well before the initial six pieces are in place.” (*Id.* at pp. 1266-1267.) The court reasoned that the presentation left “the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence,” and invited the jurors “to jump to a conclusion, a process completely at odds with the jury’s serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt.” (*Id.* at p. 1267.) The court concluded, however, that the error was harmless, in part, because defense counsel had argued vigorously against the prosecutor’s analogy,

and the trial court had instructed the jury on the burden of proof following closing arguments. (*Id.* at pp. 1268-1269.)

As the Supreme Court observed in *Centeno*, “[t]he use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors’ own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the jurors to guess or jump to a conclusion.” (*Centeno, supra*, 60 Cal.4th at p. 679.) Because “facts supporting proof of each required element must be found in the evidence,” it is “misleading to analogize a jury’s task to solving a picture puzzle depicting an actual and familiar object unrelated to the evidence.” (*Id.* at p. 670; see also *People v. Dalton* (2019) 7 Cal.5th 166, 260 [use of charts or diagrams to explain the reasonable doubt standard presents significant risk of confusing or misleading the jury].)

In this case, the prosecutor’s puzzle analogy suffered from similar flaws. The prosecutor told the jury that, even without “all the pieces,” it could feel “comfortable” identifying the subject of a jigsaw puzzle as the image of Big Ben because “there’s a certain point where you can see the picture” and can say, “That’s Big Ben. I know that.” The prosecutor then suggested that the level of comfort one feels in recognizing an iconic image in a puzzle was equivalent to proof beyond a reasonable doubt, stating: “[W]hen you’re comfortable, that’s an abiding conviction. Hey, I know what the truth is. You know, is it possible it’s something else? Sure, it’s possible. But that’s

where I'm comfortable." The prosecutor's use of the puzzle analogy to demonstrate the process of proving guilt beyond a reasonable doubt oversimplified the deliberative process and invited the jury to reach a conclusion without considering all of the evidence. Moreover, by equating an abiding conviction with a "comfortable" feeling, the prosecutor implied that the standard of proof was less exacting than the constitutionally required standard of proof beyond a reasonable doubt.

Rodriguez contends that the prosecutor also committed misconduct in his rebuttal argument by repeatedly suggesting to the jury that it could find guilt based on a reasonable account of the evidence. A review of the challenged remarks, however, does not support this contention. Rather, the record reflects that the prosecutor was merely arguing to the jury that the People's theory of the case was reasonable in light of the evidence. Specifically, in asserting that Anthony was a credible witness, the prosecutor told the jury that his conduct on the night of the carjacking and during his trial testimony was reasonable because it was consistent with someone who had his car taken by gang members and was afraid to testify against them. The prosecutor also stated that the People's theory that Rodriguez took the car keys and then handed them to Rosas was reasonable because Rodriguez was a more senior gang member who would not steal the car himself. In addition, the prosecution argued that Rosas used force or fear against the victims by either using a gun or aggressively lifting his shirt, and that both interpretations of the evidence were reasonable. In making these arguments, the prosecutor never suggested to the jury that a mere reasonable account of the evidence was sufficient to meet the People's burden of proof.

While the prosecutor's use of the jigsaw puzzle analogy was clearly improper, it is not reasonably likely that the jury understood or applied the remarks in an erroneous manner. Immediately after the prosecutor made the puzzle analogy and defense counsel objected, the prosecutor displayed "the exact rule" for the jury to see. Although the record on appeal does not disclose which "rule" the prosecutor showed to the jury, it appears that it was the jury instruction defining reasonable doubt because the prosecutor described it as follows: "It's not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. What it comes down to is [an] abiding conviction of the truth of the charge. That's the law." This language closely tracks the definition of reasonable doubt set forth in CALJIC 2.90, which the trial court read to the jury prior to the parties' closing arguments. The prosecutor also reminded the jury that it would have this instruction "in your packet," and at the end of his rebuttal, he again referred to the standard of proof as "beyond a reasonable doubt." Because the prosecution's puzzle analogy was immediately followed by a correct statement of the law on the standard of proof, it is not reasonably probable that the jury applied a different standard in reaching its verdict.

In addition, contrary to Rodriguez's argument on appeal, the evidence against him was strong. Surveillance video from the liquor store showed that Anthony's car keys were on the counter when he and Mishel left the store, and were missing moments after Rodriguez walked away from the counter. A short time later, Rosas used Anthony's car keys to gain access to his car. When Rodriguez was arrested a few days later, he was in possession of Anthony's cell phone, which had been in Anthony's

car at the time it was taken. Rodriguez and Rosas were both members of the Diamond Street gang, and they were seen together six months before the carjacking occurred. Under these circumstances, the prosecutor's use of the puzzle analogy did not constitute a pattern of conduct so egregious that it rendered the trial fundamentally unfair, nor was it reasonably probable that Rodriguez would have obtained a more favorable result had the comments not been made. On this record, no prejudicial misconduct occurred.

## **VI. Cumulative Error**

Rodriguez argues that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Whether considered individually or for their cumulative effect, none of the errors alleged by Rodriguez deprived him of his right to due process of law. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 155.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Rodriguez received a fair trial and has failed to show any cumulative error requiring reversal of his convictions.

### **DISPOSITION**

The true findings on the gang enhancement allegations are reversed. The judgment is otherwise affirmed. Should the People wish to conduct a new trial on the gang enhancements, within 60 days of the remittitur, they may file a written demand for a new trial. If a demand is made, a new trial may be held on the gang enhancement allegations; if no demand is made, Rodriguez shall be resentenced on the convictions.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.